NO. 48348-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

STEVEN N. RUSSELL,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEPHEN E. BROWN, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: __s/ Jason F. Walker___
JASON F. WALKER
Chief Criminal Deputy
WSBA #44358

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

TABLES

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR 1

RESPONDENT'S COUNTER STATEMENT OF THE CASE 1

ARGUMENT 6

1. **Substantial evidence supports the Defendant's conviction for assaulting Corporal Green.** 6

   Standard of review. 6

   It was the jury's decision as to whether the Defendant intended to knock over Corporal Green. 2

2. **Defense counsel was not ineffective because the jury instructions were legally correct and consistent with the defense's theory of the case.** 4

   Standard of review for Ineffective Assistance of Counsel. 4

   The jury instruction is an accurate statement of the law, and did not prejudice the defendant. 6

   The Defendant fails to establish either of the two prongs of ineffective assistance. 8

   Trial counsel was not ineffective for failing to object to admissible, non-prejudicial testimony. 10

   Evidence of the Defendant's uncooperative and resistive behavior was admissible as *res gestae* evidence and because it was probative 11

   There was no evidence produced at trial that the Defendant had committed an act of domestic violence. 12

3. **There was no prosecutorial misconduct.** 13

   The Defendant bears the burden of proving prosecutorial misconduct. 14

   The prosecutor did not appeal to the jury's "passion and prejudice," but framed the issue as one of credibility, and properly addressed matters raised by the defense. 16

The Prosecutor argued about matters that the jury could reasonably infer to argue that the police were the more believable witnesses..... 19

The State did not minimize the burden of proof..... 21

The issue of appellate costs is not yet ripe. 23

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

State v. Aguirre, 168 Wn.2d 350, 363–64, 229 P.3d 669, 676 (2010)..... 6
State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008)..... 23
State v. Carson, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015)..... 5, 6
State v. Freeburg, 105 Wn. App. 492, 498, 20 P.3d 984, 987 (2001)..... 12
State v. Homan, 181 Wn. 2d 102, 330 P.3d 182 (2014)..... 2
State v. Jarvis, 160 Wn. App. 111, 246 P.3d 1280 (2011)..... 3
State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722 (1986)..... 4
State v. Osman, 192 Wn. App. 355, 366 P.3d 956 (2016)..... 22
State v. Salinas, 119 Wn. 2d 192, 829 P.2d 1068 (1992)..... 2
State v. Tharp, 27 Wn. App. 198, 616 P.2d 693 (1980)..... 11
State v. Tyler, 138 Wn. App. 120, 155 P.3d 1002, (2007)..... 3
State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006)..... 14
Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)..... 5, 6

Other Authorities

WPIC 1.02..... 16
WPIC 17.02.01..... 6, 7, 10

Rules

ER 404..... 11

RESPONSE TO ASSIGNMENTS OF ERROR

1. **Substantial evidence supports the Defendant's conviction for assaulting Corporal Green.**

2. **The Defendant fails to establish ineffective assistance of counsel because a) the jury instructions were accurate as to the law, and allowed the Defendant to argue his case; and b) no inadmissible testimony was introduced.**

3. **The Defendant fails to establish prosecutorial misconduct because nothing in the prosecutor's closing argument was improper.**

4. **This court should defer deciding the issue of appellate costs unless and until the State both prevails and requests costs.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

On the night of the incident Mr. Justin Williams was smoking a cigarette in an alley, when he heard a man outside yelling and pounding on a door. Verbatim Report of Proceedings at 15. Mr. Williams heard a female start yelling, "Don't hit me! Stop hitting me!" so he called 911. VRP at 15-16. Mr. Williams could not say if it was a male or a female scream. VRP at 20. This occurred at about 11:45 PM. VRP at 22.

Corporal Dale Green of the Aberdeen Police Department was on duty that night as the night shift supervisor. VRP at 24-25. Officer Watts of the Aberdeen Police and Sergeant Salstrom from neighboring Hoquiam also responded, but Corporal Green arrived first. VRP at 29.

Corporal Green spoke with Mr. Williams when he arrived, and was directed towards the disturbance. VRP at 31. He got out of his patrol car and heard a female voice screaming. VRP at 33. He also heard a repetitive thumping noise. *Id.* He thought it might be an assault. *Id.* As he walked up to the house, the screams got louder. VRP at 34.

Corporal Green pounded on the door repeatedly and yelled, "Aberdeen Police," but the only response was the screaming. VRP at 35. He tried to open the door, but it was slippery. *Id.* Corporal Green got the door open slightly, but then the Defendant came to the door and slammed it on Corporal Green's boot. *Id.*

Officer Watts could hear more yelling inside, so he forced the door open. VRP at 123. Officer Watts testified he forced entry because the initial call had been of domestic violence, and the fight appeared to be ongoing, and they were concerned for those inside. *Id.* Officer Watts was first in, followed by Corporal Green and Sergeant Salstrom. VRP at 38.

The inhabitants were screaming profanities and racial epithets and flipping off the officers. VRP at 39. The inhabitants did not obey the officer's verbal commands. *Id.* The officers were ordering the inhabitants to show them their hands and step back. VRP at 41.

The Defendant charged past Officer Watts and came towards Corporal Green, knocking him over. VRP at 43. Officer Green recovered and saw the Defendant heading towards Sgt. Salstrom. *Id.* Corporal Green kept his attention away, because he knew that the other officers would handle the Defendant, and Corporal Green was still facing another hostile individual. VRP at 44-45.

Sergeant Salstrom was the third officer in, after Corporal Green and Officer Watts. VRP at 81. Sergeant Salstrom described the atmosphere as hostile and intense, with the inhabitants screaming and flipping off the officers. VRP at 83. Sergeant Salstrom testified that their goal was just to get everyone calmed down and separated so they could find out what was going on. VRP at 83-84. Laura Maldonado, one of the residents, was screaming and yelling at Sergeant Salstrom, and blocking his path. VRP at 82. Sergeant Salstrom was concerned for Corporal Green and Officer Watts because he could see the people they were dealing with were hostile and weren't showing their hands. VRP at 82. Sergeant Salstrom warned Ms. Maldonado that she would be arrested for obstructing if she didn't get out of the way. VRP at 88. Finally, he took ahold of her, and then he saw the Defendant charging at him. VRP at 89.

Sergeant Salstrom saw the Defendant approaching him with a cocked fist, and tried to back up, but the floor was slippery. VRP at 90. He drew and fired his Taser. *Id.* It had no effect. VRP at 93. Because the Defendant is twice Sergeant Salstrom's size, and Sergeant Salstrom did not want to resort to deadly force, he dove out the back door. VRP at 94-95. the Defendant came out behind Sergeant Salstrom, trying to punch him. VRP at 95. In the ensuing struggle, the Defendant ended up on the ground, but continued to fight. VRP at 96. Officers used a Taser, pepper spray and their fists to subdue the Defendant, and finally arrest him. VRP at 96-97.

Corporal Green testified that, after the Defendant was arrested, no one would cooperate or explain what had been going on, and that no one was arrested for domestic violence. VRP at 56. Corporal Green said that afterwards, the officers were not allowed back in the house to investigate. VRP at 60. He said that Ms. Maldonado did not appear to have been "beaten," but Ms. Russell had abrasions on her chest. VRP at 57.

Tricia Russell, the Defendant's sister, admitted that she had been arguing with her boyfriend and threw a "thing" of laundry soap at him. VRP at 171-72. She denied her brother threw any punches. VRP at 177.

Ms. Russell claimed that the scratches on her were caused by the police, not by the Defendant or Alejandro, her boyfriend. VRP at 173-74.

Laura Maldonado said there was an argument, but it wasn't loud. VRP at 189-90. She testified that Ms. Russell tried to answer the door when they heard knocking, and the police just rushed in. VRP at 191. She said she got pushed down to the bed and her hair was pulled by Sgt. Salstrom. *Id.* She testified that the only noise was a thumping caused by a washing machine. VRP at 199. She also admitted to a prior conviction for falsifying an insurance ID. VRP at 197.

The Defendant testified that the domestic violence call was due to a "little argument" between his sister and her boyfriend, Alejandro Ramirez. VRP at 211-12. the Defendant said he split them up. *Id.* The Defendant said that the issue was dealt with. VRP at 217. He testified that they were discussing whether they were going to see a movie. VRP at 216. the Defendant said they were sitting and talking when the police came in. VRP at 218-19. the Defendant said he did not know why they were there and told the police to get out. VRP at 219. He said he may have brushed up against an officer, but he was just trying to check on his girlfriend (Ms. Maldonado.) VRP at 223. He denied knocking Corporal

Green to the ground. *Id.* The Defendant said he was standing when he was shot with a Taser. VRP at 224.

In closing argument, the State argued that this case came down to credibility. *See* VRP at 285. The State argued that the defense witnesses' testimony was not credible because they claimed that there was no loud argument, contrary to Justin Williams' testimony. VRP at 287. The State argued that it was unrealistic for the involved officers to take their time "to bust into somebody's house and Tase and pepper spray and beat up a guy for no reason" when all the officers testified that domestic violence calls were potentially dangerous for responding police. VRP at 288.

ARGUMENT

1. Substantial evidence supports the Defendant's conviction for assaulting Corporal Green.

Because the jury could have concluded that the Defendant knocked over Corporal Green intentionally because he wanted to assault Sergeant Salstrom, or that the door closing on Corporal Green's foot constituted an assault, substantial evidence supports the conviction.

Standard of review.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the

State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Green,* 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980).) "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (citing *State v. Partin,* 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977).) "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (citing *State v. Theroff,* 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wash.2d 385, 622 P.2d 1240 (1980).) Appellate courts "defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson,* 129 Wash.App. 95, 109, 117 P.3d 1182 (2005).)

It was the jury's decision as to whether the Defendant intended to knock over Corporal Green.

The evidence was that the Defendant rushed towards Corporal Green on his way to assault Sergeant Salstrom, knocking Corporal Green over on his way.

An "[a]ssault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in physical injury." *State v. Tyler*, 138 Wn. App. 120, 130, 155 P.3d 1002, 1007 (2007) (citing *State v. Shelley*, 85 Wash.App. 24, 28–29, 929 P.2d 489 (1997).) "[T]he intent required for assault is merely the intent to make physical contact with the victim, not the intent that the contact be a malicious or criminal act. *State v. Jarvis*, 160 Wn. App. 111, 119, 246 P.3d 1280, 1285 (2011) (citing *State v. Hall*, 104 Wash.App. 56, 62, 14 P.3d 884 (2000).)

The jury needed only to believe that the Defendant intended to touch Corporal Green, not that he meant to knock him over, to find that the Defendant's actions were intentional. The jury could have found the intent based upon the Defendant's hostility towards the police, or the lack of any evidence the Defendant attempted to warn Corporal Green to get out of the way.

the Defendant points out in his brief that the jury could have believed that the Defendant intentionally knocked Corporal Green over while running to the aid of Ms. Maldonado. Brief of Appellant at 15, n. 5.

Alternatively, the jury could have also decided that the Defendant slamming Corporal Green's boot in the door constituted an intentional assault. VRP at 35.

Drawing all inferences in favor of the State, a rational jury could have concluded that the Defendant intended to assault Corporal Green. This was the jury's decision, and substantial evidence supports it. This court should leave the verdict undisturbed.

2. Defense counsel was not ineffective because the jury instructions were legally correct and consistent with the defense's theory of the case.

The Defendant next claims that his trial counsel proposed an incorrect jury instruction, and claims ineffective assistance of counsel as a result. However, the instruction is a correct statement of the law, and the Defendant fails to identify what instruction would have been more correct, or how the outcome of the trial would have differed.

Standard of review for Ineffective Assistance of Counsel.

The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). Ineffective assistance of counsel is a fact-based determination…" *State v. Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064,

1066 (2015) (citing *State v. Rhoads*, 35 Wash.App. 339, 342, 666 P.2d 400 (1983).) Appellate courts "review the entire record in determining whether a defendant received effective representation at trial." *Id.*

Strickland explains that the defendant must first show that his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689. "Reviewing courts must be highly deferential to counsel's performance and 'should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Carson* at 216 (quoting *Strickland* at 690.)

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The defendant bears the "heavy burden" of proof as to both prongs. *Carson* at 210. If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

The jury instruction is an accurate statement of the law, and did not prejudice the defendant.

"'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'" *State v. Aguirre*, 168 Wn.2d 350, 363–64, 229 P.3d 669, 676 (2010) (quoting *Keller v. City of Spokane*, 146 Wash.2d 237, 249, 44 P.3d 845 (2002).) "If... a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an abuse of discretion." *Id.* (citing *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wash.App. 412, 430, 40 P.3d 1206 (2002).)

The trial court, in deciding to give the WPIC 17.02.01, explained its reasoning, saying,

> And so I did include... the patterned instruction regarding defense of self or others when defending against arrest by law enforcement, whether lawful

> or unlawful. So although the primary defense appears to be that there was no - defendant did not assault anyone, other evidence in the case and – at least is an arguable basis to support the giving of the instruction. I would rather have the – because of the references throughout the trial to self-defense and defending the home and defending this and that, I would rather instruct the jury on what the law is rather than to get a question later going what's the law on self-defense. So just to avoid that, I don't see what prejudice it gives to the - would prejudice one side or the other in giving that, just gives the jury information about what the law is. That's why I included that.

VRP at 267-68.

In the instant case the instructions allowed both sides to argue their theory of the case, and were a correct statement of the law. Indeed, the Defendant has not argued to the contrary. As stated by the trial court, the instruction clarified the law for the jury in a matter that the defense had repeatedly tried to raise. See VRP at 57, 113 & 301. Also, the Defendant appeared to claim that he acted in self-defense in his trial materials. See CP at 30 - 32.

To any extent that WPIC 17.02.01 was inapplicable to the instant case, it was undoubtedly harmless. "An erroneous instruction is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict." *State v. Frasquillo*, 161 Wn. App. 907, 915, 255 P.3d 813,

817 (2011) (citing *State v. Brown*, 147 Wash.2d 330, 332, 58 P.3d 889 (2002).)

The complained-of instruction was a correct statement of the law as it applied to an issue the Defendant tried to raise throughout the trial. There was no error to include it. At worst, it was a surplus instruction, albeit one that correctly stated the law.

The Defendant fails to establish either of the two prongs of ineffective assistance.

The Defendant claims that his trial counsel proposed the wrong instruction (WPIC 17.02.01), and therefore left "the jury without instruction on the legal concept critical to the defense." Appellant's brief at 12. The Defendant claims that, "with proper research, [the Defendant's] attorney could have determined the correct legal standard…" *Id.* However, what legal concept or instruction might have been proper is left to the imagination of the reader.

Because the Defendant fails to identify what jury instruction, legal concept or law would have been applicable to this case, he fails to establish that his trial counsel's performance was deficient.

It is likely that no such instruction, concept or law is identified because there is no applicable instruction, concept or law. When a defendant claims self-defense for using force against a law enforcement

officer, the general self-defense rule does not apply. *State v. Calvin*, 176 Wn.App. 1, 14, 316 P.3d 496 (2013) (setting forth the general test for self-defense that generally it "is justified if there is an appearance of imminent danger"); *see also State v. Bradley*, 141 Wn.2d 731, 737, 10 P.3d 358 (2000); RCW 9A.16.020(3). The use of force in self-defense against an arresting law enforcement officer is permissible only when the arrestee *actually* faces an imminent danger of serious injury or death. *Calvin*, 176 Wn.App. at 14; *Bradley*, 141 Wn.2d at 737. As our Supreme Court explained, " '[o]rderly and safe law enforcement demands that an arrestee not resist a lawful arrest ... unless the arrestee is actually about to be seriously injured or killed.' " *Bradley*, 141 Wn.2d at 738 (quoting *State v. Holeman*, 103 Wn.2d 426, 430, 693 P.2d 89 (1985)). The Washington Supreme Court explained the policy rationale for this rule:

> [T]he arrestee's right to freedom from arrest without excessive force that falls short of causing serious injury or death can be protected and vindicated through legal processes, whereas loss of life or serious physical injury cannot be repaired in the courtroom. However, in the vast majority of cases ... resistance and intervention make matters worse, not better. They create violence where none would have otherwise existed or encourage further violence, resulting in a situation of arrest by combat.

Holeman, 103 Wn.2d at 430 (alteration in original) (quoting *State v. Westlund*, 13 Wn.App. 460, 467, 536 P.2d 20 (1975)).

Further, as discussed above, the Defendant fails to establish prejudice from inclusion of the instruction. The instruction did not minimize the State's burden of proof; it did not misstate the law or mislead the jury. It was simply an instruction on an aspect of the law which was brought up by the defense, but which, as pointed out by the State, ultimately did not apply.

Because the Defendant fails to establish prejudice, this court should uphold the trial court's decision to include WPIC 17.02.01 and affirm the conviction.

Trial counsel was not ineffective for failing to object to admissible, non-prejudicial testimony.

The Defendant also claims that his trial counsel was ineffective for failing to object to testimony that he was uncooperative to police and resisted arrest, and that he had engaged in domestic violence, as evidence of prior bad acts, inadmissible under ER 404(b). The first claim is legally incorrect, the second is factually incorrect. The two claims will be addressed separately.

Evidence of the Defendant's uncooperative and resistive behavior was admissible as *res gestae* evidence and because it was probative.

Washington courts recognize the *res gestae*, or "same transaction" exception to ER 404(b). *State v. Tharp*, 27 Wn. App. 198, 205, 616 P.2d 693, 697–98 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981). The reasoning of this exception is that a defendant "may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character." *Id.*

In the instant case the Defendant was arrested for assaulting Corporal Green and Sergeant Salstrom just seconds after he had done so. The arrest was in reaction to the assault, and striking, pepper spraying, Tasing and handcuffing him was as much to prevent additional assaults as it was to take him to jail. Evidence of his arrest was an essential part of the transaction. The Defendant's trial counsel cannot be held ineffective for simply knowing the *res gestae* rule well enough not to object.

Additionally, evidence of the Defendant's hostility towards the police was probative, because it was circumstantial evidence of his intent to assault the officers, an element the State had the burden to prove. Evidence of resistance to arrest and related conduct is admissible if it leads

to a reasonable inference of consciousness of guilty to the charged crime. *State v. Freeburg*, 105 Wn. App. 492, 498, 20 P.3d 984, 987 (2001) (citing *State v. Bruton*, 66 Wash.2d 111, 401 P.2d 340 (1965) and *U.S. v. Myers*, 550 F.2d 1036 (5th Cir.1977).)

In short, the evidence of the Defendant's arrest, and his resulting conduct, was admissible evidence. Trial counsel cannot be ineffective for not objecting to admissible evidence.

There was no evidence produced at trial that the Defendant had committed an act of domestic violence.

The second claim appears to be based on a misreading of the record. There was no evidence that the Defendant had engaged in domestic violence; rather, the evidence adduced at trial suggested that the Defendant's sister was the victim of domestic violence at the hands of her boyfriend, Alejandro Ramirez, and the Defendant tried to intervene and resolve the issue. Therefore, the evidence the Defendant complains of was not prejudicial at all.

Justin Williams, the reporting party, never said who was screaming, and could not even say if it was a male or female screaming. The responding officers all testified that they were responding to a *possible* domestic violence call, and none of the officers testified that they arrested anyone for domestic violence. Corporal Green testified that no

one was arrested for domestic violence that night. VRP at 56. Officer Watts testified that he never knew if any domestic violence had occurred. VRP at 132. Officer Peterson said that he could not say who caused the scratches on the Defendant's sister. VRP 166. The defense witnesses all testified that the dispute had been between the Defendant's sister, Patricia Russell, and her boyfriend, Alejandro Ramirez.

In short, the evidence was that Ms. Russell and her boyfriend were arguing, the Defendant, by his own account, was acting as the peacemaker, Mr. Williams heard the argument and called the police, and the police arrived, were assaulted by the Defendant, and they arrested him for it. No witness testified that the Defendant was involved with any assaultive behavior before the police arrived, or of any domestic violence. Because there was no testimony that the Defendant was engaged in domestic violence, the Defendant's claim that his lawyer should have objected to such testimony fails. His counsel was not ineffective. The verdict should be upheld.

3. There was no prosecutorial misconduct.

The Defendant next takes selected quotes from the State's closing argument out of context to claim prosecutorial misconduct. However, when the full record is considered, the Defendant's claim fails.

The Defendant bears the burden of proving prosecutorial misconduct.

"To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial." *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646, 655 (2006) (citing *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997).)

Here, the Defense witnesses essentially testified that there was no disturbance; that the police simply showed up at their house, forced entry, and started assaulting them for no reason, and the Defendant committed no assaults. The State's closing argument highlighted the reasons that this version of events was suspect; the police witnesses had testified that they were understaffed that night; officers from a neighboring municipality had to be called to assist; the officers expressed concern for their own personal safety. The State pointed out that the police were unlikely to spend their time breaking into houses and assaulting people for no reason. The State also pointed out the apparent lack of any responsibility on the part of the defense witnesses; they were hostile to the police, and later denied that the incident that caused Justin Williams to call 911 had even occurred.

The phrases the Defendant cherry-picks from the closing argument were part of this argument. When the State said that the police "…go out

there and risk their lives to defend people," it was in the context of the defense witnesses' lack of cooperation when the police arrived at their house. See VRP at 288-89. When the State argued that the Defendant should be made to "suffer the consequences," it was in the context of the Defendant and his witnesses' attitude towards the incident. See VRP at 298. And when the State argued that the less lethal weapons used on the Defendant (i.e. pepper spray and a Taser) were preferable to a Billy club and a gun, this was in response to the defense closing argument, where trial counsel argued that use of pepper spray was excessive force and that Tasers cause serious bodily injury. VRP at 303, 306.

The Defendant's arguments that the State asked the jury to "send a message" and "protect the community" are not supported by the record. The State framed the case in terms of competing versions of events, and the arguments cited by the Defendant were largely to point out why the defense witnesses' testimony was questionable.

The Defendant's argument mischaracterizes selective quotes. The State did not commit prosecutorial misconduct. This conviction should be affirmed.

The prosecutor did not appeal to the jury's "passion and prejudice," but framed the issue as one of credibility, and properly addressed matters raised by the defense.

The Defendant claims that the prosecutor committed misconduct, and selectively plucks out-of-context phrases from closing argument as support. When placed in context, it is clear that the Defendant's claims are without merit.

First, the Defendant says "the prosecutor argued that the jury should believe the police officers' version of events because 'they go out and risk their lives to defend people.'" In fact, the prosecutor was characterizing the defense witnesses as intentionally obstructionist, and whose sullen demeanor was indicative of unreliability, as the full passage, below, illustrates.

> This is the game, folks. Don't have to cooperate with these police officers. These men who put on badges and armors - armor and go out there and risk their lives to defend people. To the heck with them. Just don't cooperate and later on say I don't know, I wasn't doing anything. So who do you believe, folks?

VRP at 288-89. The prosecutor was arguing within WPIC 1.02 (Instruction No. 1)[1] which instructs the jury that they are the sole judges of

---

[1] Clerk's Papers at 11.

the credibility of each witness. As previously noted, this case largely came down to the credibility of the police officers versus the credibility of the defense witnesses, whose version of events differed greatly from that of the officers and the non-police witness, Justin Williams.

Next, the Defendant claims the prosecutor implored the jury to make the Defendant "suffer the consequences" because "the consequences are real." Again, these selective quotes are out of context. The full passage, below, shows that the prosecutor said that "the consequences were real" *for the police*. This was part of the prosecutor's continuing theme that the police were in a dangerous situation, and the Defendant and his witnesses' apparent disregard for authority made them not credible in this matter. The whole quote is,

> The police were so concerned they decide they were going to have to force the door open. Okay. That decision right there is huge. Because at that point they are taking action that they know might have consequences that they're wrong. They have at that point made a determination that this action is necessary. And they go in and what do they find? They find people with alcohol on their breaths, although they denied it. They said nobody had been drinking. Nobody had been drinking. The officers could smell it. I mean they stop people for DUI's [*sic*] all of the time, folks. They know how to smell alcohol. People had been drinking. How much, who knows. But these people are uncooperative. They're trying to stop the officers, they're not letting them

> by. They're not showing their hands. They're not obeying commands when all the officers are trying to do is find out if anybody is hurt. And then when one of them just won't get out of the way, when the officers think there's a crisis situation and the officer has to move her out of the way, that's it. The defendant is mad and he knocks one over because he's in his house and nobody is going to tell him where to go and he goes after Sergeant Salstrom, slipping on laundry detergent and trying to get out. And when the officers identify that threat, it all folks [*sic*] on the defendant.
>
> That's what happened here, folks. It's not that the police just showed up and decided to attack some random person. They were threatened and they know that if there is a threat, they've got to get away. They have to. They have to, because if they don't, the consequences are real. And people that don't understand that, think they can just fail to cooperate and obstruct and not tell the police to get the F out of their house and think they don't have to suffer the consequences. Well, folks, make him suffer the consequences, find him guilty. Thanks.

VRP at 297-98.

Finally, the Defendant attacks the prosecutor's reference to the officers' use of less lethal weapons, although how this is improper or prejudicial is not explained. A reading of the whole record reveals that these statements were in response to the defense's argument that the officer's use of force and less lethal weapons was excessive.

Specifically, the defense argued, "They knocked him down, several officers jumped on the back and started tasing, giving commands here. Like I said, when you tase, your muscles tense up. He couldn't put his hands behind his back. Tased him again. Tased him again. Tased him again." VRP at 302. Later, the defense argued, "Then what happens after that, he pepper sprayed him. That's excessive." VRP at 303.

The prosecutor responded with,

> Folks, that's why they carry those less lethal weapons. The defendant ought to be glad it's not the old days when all the cop has is a billy club and a gun. Okay. But they use those less lethal weapons because they had to, because the defendant knocked over Corporal Green who was in plain sight, must have been intentional.

VRP at 314. It is no matter of dispute that pepper spray and Tasers are comparatively recent introductions into the arsenal of the police. Taken in context, the prosecutor's argument was that the use of the Taser and pepper spray was not excessive, and that these less lethal weapons, unpleasant as they may be, are preferable to more lethal weapons.

The Prosecutor argued about matters that the jury could reasonably infer to argue that the police were the more believable witnesses.

The Defendant next claims misconduct based upon the State referencing potential consequences that police witnesses might suffer had

they actually broken into the Defendant's house for the purpose of assaulting and arresting him without provocation. the Defendant claims there was no testimony about such consequences, and therefore the State's argument constitutes misconduct.

The offending passage appears to be,

> Do you believe their [the defense witnesses'] version of events, which is basically that the Hoquiam and the Aberdeen Police, working on a bare bones crew, have time to go bust into somebody's house, risk their careers, their badges, and their pensions, to bust into somebody's house and tase [*sic*] and pepper spray and beat up a guy for no reason? When they've got the jail to look after, when they've got the whole city to look after, there's only four guys off-duty and they're calling guys in from other cities. Is that reasonable?

But any reasonable person would assume that a police officer (or anyone) would suffer consequences for engaging in the kind of behavior that the Defendant's witnesses accused the officers of. There was no need for testimony that breaking and entering for the purpose of assaulting and illegally arresting the Defendant would have serious professional consequences for the police. In fact, such testimony would have speculative, and therefore of questionable admissibility.

It was not misconduct to argue that the police officers involved would risk suffering consequences for assaulting the Defendant for no

reason. It is within the realm of those things which is not reasonably in dispute, and reasonably inferred by any juror based upon common sense and experience. This line of argument does not constitute misconduct.

The State did not minimize the burden of proof.

The Defendant claims that the State minimized the burden of proof by telling the jury that if they believed the Defendant's guilt for "a few minutes," they were satisfied beyond a reasonable doubt. the Defendant cites *State v. Osman* for the proposition that this argument is minimization of the State's burden. The two problems with this argument are that 1) the State never said it; and 2) *State v. Osman* does not stand for the Defendant's proposition.

"An instruction cast in terms of an abiding conviction as to guilt ... correctly states the government's burden of proof...." *Id.* (citing *Victor v. Nebraska*, 511 U.S. 1, 14-15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).) The portion of the State's argument that the Defendant interpolates to mean "a few minutes," is,

> The question is do you believe it. Because that's the definition of reasonable doubt, do you believe it. You have an abiding belief. Do you believe it now, you go back there and you talk about it, you come back here and announce your verdict and you still believe it.

VRP at 293.

At no time did the State say "a few minutes," or anything like it. The defense argument appears to be that, because the jury might be back in from the jury room in a few minutes, that might be what the State meant, and therefore this court should interlineate it in to the record.

The Defendant claims that such an argument would run afoul of *State v. Osman*, 192 Wn. App. 355, 366 P.3d 956 (2016). This too would require this court add content.

The holding of *Osman*, in relevant part, is simply that an argument that "a juror should not 'look back' on the decision 'the minute [they] walk out of this courthouse' or '[a] month' or '[a] year' later and 'wonder if I made a mistake,' [does not] not overstate or improperly quantify the State's burden of proof." *Id.* at 375.[2]

Osman does not stand for the proposition that "a few minutes" is too short of a time for a belief to abide. Nor did the State even make such an argument. The State cast the argument in terms of "an abiding belief."

---

[2] In *Osman*, the prosecutor had objected to the defense's characterization of "an abiding belief," and the objection had been sustained. On appeal, the defendant argued that the ruling sustaining the objection was error, and while Division One of this court agreed, they found the error harmless beyond a reasonable doubt. See *Osman* at 358.

The Defendant's argument is without merit and this conviction should be upheld.

The issue of appellate costs is not yet ripe.

Finally, the Defendant asks this court not to impose appellate costs if the State prevails and moves to impose costs. However, the State has not asked for costs, or even prevailed, at this point. The issue is not yet ripe.

"'Three requirements compose a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678, 685 (2008) (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wash.2d 238, 255–56, 916 P.2d 374 (1996).)

This court has the discretion to impose the costs, however, as of yet, there is no request for costs. This issue is not ripe because no party has yet prevailed. This issue should not be decided unless and until the State both prevails, and asks for costs.

CONCLUSION

The Defendant's assignments of error are without merit. All inferences are drawn in favor of the State for his first assignment, and the Defendant bears the burden of proof with respect to the others.

Because the jury could have found that either the Defendant intended to knock Corporal Green over, or that slamming Corporal Green's foot in the door was an intentional assault, and the inference is drawn in the State's favor, substantial evidence supports the Defendant's conviction.

The Defendant also fails to establish either prong of his ineffective assistance claim. He claims that trial counsel chose the wrong jury instruction, but fails to identify the right one, or show how the instruction that was given was prejudicial. He claims that his trial counsel should have objected to testimony that he resisted arrest, clearly *res gestae* evidence and relevant testimony in light of the charges of assaulting police officers. The final claim appears to be based on a misreading of the record. Although the officers were responding to a domestic violence call, the argument appears to have been between the Defendant's sister and her boyfriend.

The Defendant also fails to establish prosecutorial misconduct. The passages that the Defendant complains of are taken out of context, apparently to make them seem inflammatory, when in fact they are not. The Defendant goes to great lengths to re-write the record to claim the State minimized the burden of proof. The State simply never said what the Defendant claims, and even if the prosecutor did say it, *State v. Osman* is inapposite.

Finally, the issue of appellate costs should be addressed when ripe. That time is not now.

These assignments of error are without merit. This court should leave the jury's verdict undisturbed and uphold the conviction.

DATED this _23rd__ day of January, 2017.

Respectfully Submitted,

BY: _s/ Jason F. Walker__
JASON F. WALKER
Chief Criminal Deputy
WSBA #44358

/

GRAYS HARBOR COUNTY PROSECUTOR

January 23, 2017 - 4:22 PM

Transmittal Letter

Document Uploaded: 3-483483-Respondent's Brief.pdf

Case Name: State of Washington v. Steven N. Russell
Court of Appeals Case Number: 48348-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jason F Walker - Email: jwalker@co.grays-harbor.wa.us

A copy of this document has been emailed to the following addresses:

skylarbrettlawoffice@gmail.com